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Dean R. Potter and Diane B. Potter dba Dean's Superlube v. Reta Chadaz (Party who claims 66 foot right-of-way), Gary Bywater and Karleen C. Bywater (on warranty Deed), First American title Ins. Co. (on title Policy); and John DOES 1- 10, who may claim interest in said right-of-way : Brief of Appellant

Utah Court of Appeals

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Marlin J. Grant; Olson and Hoggan; Attorneys for Plaintiff/Appellee.
Reed W. Hadfield; Stephen R. Hadfield; Mann, Hadfield & Thorne; Attorneys for Defendant/Appellant.

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COURT OF APPEALS
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DOCKET NO. 970756-CA

IN THE UTAH COURT OF APPEALS

DEAN R. POTTER and
DIANE B. POTTER dba
Dean's SuperLube,

Plaintiffs and Appellees,

vs.

RETA CHADAZ (Party who claims 66 foot right-of-way), GARY BYWATER and KARLEEN C. BYWATER (on Warranty Deed), FIRST AMERICAN TITLE INS. CO. (on Title Policy);and JOHN DOES 1-10, who may claim interest in said right-of-way,

Defendants and Appellant.

Case No. 970756-CA

Priority No. 15

BRIEF OF APPELLANT RETA CHADAZ

APPEAL FROM THE FIRST JUDICIAL DISTRICT COURT OF
BOX ELDER COUNTY, STATE OF UTAH
THE HONORABLE GORDON J. LOW, PRESIDING

Marlin J. Grant (#4581)
OLSON & HOGGAN
Attorneys for
Plaintiff/Appellees
88 West Center
P. O. Box 525
Logan, Utah 84323-0525
Telephone: (801) 752-1551

Reed W. Hadfield (#1289)
Stephen R. Hadfield (#5707)
MANN, HADFIELD & THORNE
Attorneys for
Defendant/Appellant
98 North Main Street
P. O. Box 876
Brigham City, Utah 84302-0876
Telephone: (801) 723-3404

Oral Argument Requested

of Appeals
JUN 17 1998
Julia D'Alesandro
Clerk of the Court

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Attorneys for
Defendant/Appellant
98 North Main Street
P. O. Box 876
Brigham City, Utah 84302-0876
Telephone: (801) 723-3404

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STATEMENT OF JURISDICTION

The Supreme Court has original appellate jurisdiction pursuant to Utah Code Ann. §78-2-2(3)(j).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ISSUE NO. 1: Is there a genuine issue as to any material fact as to whether or not there is an easement in favor of the defendant, Chadaz, over the property owned by the plaintiffs?

A. Standard of Review: The conclusions of the trial court are reviewed for correctness, and no deference is given to the trial court's conclusions. Bonham v. Morgan, 788 P.2d 497 (Utah 1989); Schurtz v. BMW of N. Am., Inc., 814 P.2d 1108 (Utah 1991) and Niederhauser Bldrs. & Dev. Corp. v. Campbell, 824 P.2d 1193 (Utah App. 192). When reviewing a summary judgment, the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in a light not favorable to him. Morris v. Farnsworth Motel, 259 P.2d 297 (Utah 1953). Wineger v. Froerer Corp., 813 P.2d 104 (Utah 1991) and Neiderhauser Bldrs. & Dev. Corp., 824 P.2d 1193 (Utah App. 1992). Therefore, the appellate court applies the same standard as the trial court and affirms the summary judgment only if there is no dispute as to any material fact. Durham v. Margetts, 571 P.2d 1332 (Utah 1977) and Themy v. Seagull Enters., Inc., 595 P.2d 526 (Utah 1979).

B. Preservation of Issue for Appeal: This issue was preserved for appeal by the "Verified Objections Of Defendant, Reta Chadaz, To Memorandum Of Points And Authorities In Support Of

Plaintiff's Motion For Summary Judgment" (See R. at pp. 81-115); "Verified Motion For Summary Judgment" (See R. at pp. 116-118); "Verified Memorandum of Points And Authorities In Support Of Defendant's Motion For Summary Judgment" (See R. at pp. 119-149); "Supplemental Memorandum Of Points And Authorities In Support Of Defendant's Motion For Summary Judgment And Reply To Plaintiffs' Supplemental Argument" (See R. at pp. 250-288); and "Transcript Of Summary Judgment Hearing" (See R. at p. 350).

ISSUE NO. 2: Did the trial court commit error in applying the law so as to determine there is no easement in favor of the defendant Chadaz over the property owned by the plaintiffs?

A. Standard of Review: The trial court's legal conclusions are reviewed for correctness, and no deference is given to the trial court. This court is free to reappraise the trial court's legal conclusions. Schurtz v. BMW of N. Am. Inc., 814 P.2d 1108 (Utah 1991); Barber v. Farmers Ins. Exch., 751 P.2d 248 (Utah App. 1988); and Winegar v. Froerer Corp., 813 P.2d 104 (Utah 1991).

B. Preservation of Issue for Appeal: This issue was preserved for appeal by the "Verified Objections Of Defendant, Reta Chadaz, To Memorandum Of Points And Authorities In Support Of Plaintiff's Motion For Summary Judgment" (See R. at pp. 81-115); "Verified Motion For Summary Judgment" (See R. at pp. 116-118); "Verified Memorandum of Points And Authorities In Support Of Defendant's Motion For Summary Judgment" (See R. at pp. 119-149); "Supplemental Memorandum Of Points And Authorities In Support Of Defendant's Motion For Summary Judgment And Reply To Plaintiffs'

Supplemental Argument" (See R. at pp. 250-288); and "Transcript Of Summary Judgment Hearing" (See R. at pp. 350).

ISSUE NO. 3: Should the trial court have amended or made additional findings in accordance with Rule 52(a) of the Utah Rules of Civil Procedure when granting plaintiffs' Motion for Summary Judgment?

A. Standard of Review: While the trial court's failure to adequately identify the grounds for its decision is not necessarily reversible error, " . . . the presumption of correctness ordinarily afforded trial court rulings has little operative effect when members of [the appellate] court cannot divine the trial court's reasoning because of the cryptic nature of its ruling." Retherford v. AT&T Communications, 844 P.2d 949 (Utah 1992); Allen v. Prudential Property and Cas. Ins., 839 P.2d 798 (Utah 1992).

B. Preservation of Issue for Appeal:

This issue was preserved for appeal by the "Verified Motion for Amendment to Memorandum Decision" (See R. at pp. 298-300 and 315-317); and "Verified Memorandum of Points and Authorities in Support of Defendant's Motion for Amendment to Memorandum Decision" (See R. at pp. 301-307 and 318-324).

DETERMINATIVE STATUTES AND RULES

Utah Code Ann. Section 57-3-2(1).

> Each document executed, acknowledged, and certified, in the manner prescribed by this title, each original document or certified copy of a document complying with Section 57-4a-3, whether or not acknowledged, each copy of a notice of location complying with Section 40-1-04, and each financing statement complying with Section 70A-9-402, whether or not acknowledged shall, from the time of filing with the appropriate county recorder, impart

notice to all persons of their contents.

Utah R. Civ. P. 56(c)

> Motion and Proceedings Thereon. The motion, memorandum and affidavits shall be filed and served in accordance with CJA 4-501. The judgment sought shall be rendered if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Utah R. Civ. P. 52(a)

> Effect. In all actions tried upon the facts without a jury or with an advisory jury, the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58A; in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of fact and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. Findings of a master to the extent that the court adopts them, shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum decision filed by the court. The trial court need not enter findings of fact and conclusions of law in rulings on motions, except as provided in Rule 41(b). The court shall, however issue a brief written statement of the ground for its decision on all motions granted under Rules 12(b), 50(a) and (b), 56, and 59 when the motion is based on more than one ground.

STATEMENT OF THE CASE

Plaintiffs seek to have the court declare that they own certain real property free and clear of any easement claimed by

Reta Chadaz. Reta Chadaz seeks to have the court declare that she owns a 66 foot wide right of way across the real property owned by the plaintiffs. Plaintiffs' received ownership of the property in question by Warranty Deed dated July 23, 1993 and recorded on July 29, 1993. Reta Chadaz's ownership of the 66 foot wide right of way is based upon a Special Warranty Deed dated October 24, 1980 and recorded on December 9, 1980. The reservation of the right of way in said Special Warranty Deed was to fulfill a contract obligation between the grantor of said Special Warranty Deed and Reta Chadaz.

Plaintiffs filed this action to quiet title in the disputed property (See R. at pp. 2-16) and Reta Chadaz filed a Counterclaim to quiet her title in the right of way (See R. at pp. 17-28). Both parties moved for summary judgment (See R. at pp. 52-54 and 116-118) and the trial court issued a Memorandum Decision which granted plaintiffs' motion and denied Reta Chadaz's motion. (See R. at pp. 295-297 and Addendum E). Reta Chadaz then moved to have the Memorandum Decision amended, so as to clarify the grounds for the court's ruling (See R. at pp. 298-307 and 315-326), and a second Memorandum Decision was issued by the court (See R. at pp. 327-331 and Addendum F). A Notice of Appeal was then filed by Reta Chadaz (see R. at pp. 335-340) wherein she sought review of the trial court's grant of Summary Judgment to plaintiffs.

The following facts are relevant to the issues presented for review:

1. Floyd and Reta Chadaz, sellers, owned approximately 47.12 acres which they sold on contract to Heritage Park Partners,

buyers, by contract dated May 12, 1980. (See R. at pp. 124-136 and Addendum A).

2. In keeping with this contract this entire property was placed in trust with Hillam Abstracting and Insurance Agency by Warranty Deed dated and filed May 12, 1980 at 4:10 p.m. (See R. at p. 137).

3. On the same day (May 12, 1980) a Warranty Deed was made by Hillam to buyers (Heritage Park Partners) covering all of the property owned by Chadaz fronting on Main Street in Tremonton, Utah. This deed was recorded May 12, 1980 at 4:12 p.m. The parcel includes the 1.58 acres property in dispute. (See R. at p. 138).

4. The buyers (Heritage Park Partners) subsequently defaulted on said agreement. After negotiations, a Supplemental Agreement dated November 25, 1980, was entered into to assist the buyers (Heritage Park Partners) in being able to continue in the purchase of the property. (See R. at pp. 139-145 and Addendum B).

5. As one of the conditions of the Supplemental Agreement the buyers (Heritage Park Partners) agreed:

> "that when the property fronting on Main Street, which has been released by the seller to the buyer, has been sold by the buyer to a third party that there will be a reservation of a 66 foot wide roadway from Main Street to the seller's remaining property."

(See R. at 141 and Addendum B).

6. After entering into the Supplemental Agreement the buyers (Heritage Park Partners) began doing business as Heritage Park Plaza, Inc. This was a corporation owned by all of the same individuals who were the partners in Heritage Park Partners. (See

R. at p. 266 paragraph 6; R. at pp. 270-272).

7. As a result of the change from a partnership to a corporation, a Warranty Deed from Heritage Park Partners to Heritage Park Plaza, Inc., was recorded December 9, 1980 at 3:05 p.m., covering the 1.58 acres previously conveyed by Chadaz to Heritage Park Partners. (See R. at p. 261-262 and Addendum C).

8. In accordance with the Supplemental Agreement, when the buyers (Heritage Park Plaza, Inc., formerly Heritage Park Partners) sold the property in question, 1.58 acres, to Villatek Inc., the Special Warranty Deed to Villatek contained the following provisions:

> "Subject To A Right-Of-Way Over The East 66 Feet Of Said *Property, For The Purpose Of A Proposed Road.*"

This Special Warranty Deed was recorded December 9, 1980, at 3:10 p.m. This was after the Supplemental Agreement had been entered into. This Special Warranty Deed has remained of record since that date. (See R. at pp. 263-264 and Addendum D).

9. Despite the Supplemental Agreement the buyers (Heritage Park Plaza, Inc., formerly Heritage Park Partners) again defaulted and all of the property, with the exception of the 1.58 acres of property sold to Villatek, was returned to Chadaz. (See R. at p. 85, par. 11).

10. *Some time later, by Quit Claim Deed dated May 2, 1996,* recorded October 8, 1996, Heritage Park Plaza, Inc. conveyed to Reta Chadaz all of the rights it had previously reserved in said right of way. (See R. at pp. 148-149).

11. Reta Chadaz presently owns both the right of way and approximately 35 acres to the south of said right of way which abuts to said right of way. (See R. at p. 21, par. 9 and p. 22 par. 11).

12. At the time the plaintiffs received actual notice of the claimed easement the only impovements that had been made on the disputed easement was "a fence had been removed and some gravel had been placed on said property". (See R. at p. 100 par. 4).

SUMMARY OF ARGUMENT

The court ruling was based upon the pleadings, memoranda of authorities in support of motions for summary judgments submitted by both parties and arguments of counsel. No other evidence was presented. On a review of a summary judgment the party against whom the judgment has been granted is entitled to have all the facts presented, and all the inferences fairly arising therefrom, considered in a light most favorable to him.

Defendant's position is that there is a genuine issue as to a material fact concerning each of the points raised by the plaintiffs. Briefly these points of the plaintiffs and the responses of the defendant are as follows:

1. Plaintiffs' Point - plaintiffs are bona fide purchasers without notice.

   Defendant's Response - the reservation of the disputed easement was made by a Special Warranty Deed recorded December 9, 1980, and has remained of record since that date. The plaintiffs acquired their title by Warranty

Deed recorded July 29, 1993. The plaintiffs are charged with constructive notice of said easement.

2. Plaintiffs' Point - dominant and servient parcels were separated and no longer abut each other.

   Defendant's Response - this defendant still owns the property (approximately 35 acres) abutting the south end of the disputed right of way. The reservation of the right of way was for the express purpose of providing access from Main Street to the approximately 35 acres. Defendant contends that she owns the right of way and the acreage to which it leads and these two parcels do abut to each other.

3. Plaintiffs' Point - there was no consideration to support the express grant of the easement.

   Defendant's Response - the consideration for the easement was the fact that the Buyers of the property were in default and the Sellers (defendant herein) granted the Buyers additional time to make payments and as part of the consideration for this, the Buyers agreed to the reservation of the easement (over the land that had already been deeded by the Sellers to the Buyers). This access was very important to the defendant. This remained true whether the Buyers built the road or whether upon repossession the defendant built the road.

4. Plaintiffs' Point - the defendant had abandoned the easement.

Defendant's Response - this was an express recorded right of way, not a right of way by prescription. An easement acquired by grant or reservation cannot be lost by mere nonuse for any length of time, no matter how great. There was no intent of the defendant to abandon the easement.

5. Plaintiffs' Point - defendant is barred by equitable estoppel from claiming an easement.

   Defendant's Response - there have been no false representations or concealment of natural facts by the defendant. The plaintiffs had constructive notice of the easement and certainly had a means of knowledge of the true facts. Both of these facts make the equitable estoppel doctrine inapplicable.

6. Plaintiffs' Point - this was an easement in gross and could not be transferred to subsequent owners.

   Defendant's Response - this was an easement for a road to serve as access to a subdivision. It was to specifically benefit a parcel of land. It was not a personal right (i.e. access to an individual for hunting or fishing). It was, therefore, not an easement in gross.

7. Plaintiffs' Point - the easement was no longer needed.

   Defendant's Response - this is a recorded easement. It is needed as much today as it was when it was recorded. It gives direct access to Main Street in Tremonton, Utah. There is no such direct access to the defendant's

remaining property without this easement.

8. Plaintiffs' Point - a grantor cannot reserve an easement to a third party in a deed.

   Defendant's Response - this case does not involve a third party (stranger to the deed or third party beneficiary). Heritage Park Partners, the original buyer, changed their form of doing business from a partnership to a corporation known as Heritage Park Plaza, Inc. The new corporation continued to carry out the obligations of the old partnership. The Supplemental Agreement, the deed from the partnership to the corporation and the deed from the corporation to Villatek (in which the reservation of the right of way was made) and the quit claim deed from the corporation to the defendant all support the defendant's position.

9. Plaintiffs' Point - the trial court's first Memorandum Decision which stated "For the reasons stated in the Plaintiffs' Motion for Summary Judgment the same is granted" is proper and need not be amended.

   Defendant's Response - as set forth in Rule 52(a) of the Utah Rules of Civil Procedure the trial court is required to issue a brief written statement of the grounds for its decision on all motions granted under Rule 56 when the motion is based upon more than one ground. Clearly in this case the motion was based upon a number of grounds.

ARGUMENT

POINT I

THERE IS A GENUINE ISSUE OF FACT AS TO WHETHER OR NOT THERE IS AN EASEMENT IN FAVOR OF DEFENDANT CHADAZ OVER THE PROPERTY OWNED BY PLAINTIFFS

There are several disputed and material facts which, when viewed in the light most favorable to Reta Chadaz indicate there is a genuine dispute as to whether or not she has an easement over plaintiffs' property. These disputed facts are set forth below and clearly establish that summary judgment is not proper.

A. There Is A Genuine Issue As To Whether Or Not Plaintiffs Are Bona Fide Purchasers Without Notice.

The plaintiffs argue that they were "without notice of the easement" (See plaintiffs' Memorandum of Points and Authorities in Support of Plaintiffs' Motion For Summary Judgment R. at pp. 58-59). This is contrary to the Special Warranty Deed which created the easement and which was recorded December 9, 1980, long before plaintiffs obtained the property. (See Special Warranty Deed attached to Defendant's Answer and Counterclaim as Exhibit "A" R. at pp. 25-26 and Addendum D).

Section 57-3-2(1) of the Utah Code provides in relevant part, that once a document is properly recorded it "shall from the time of filing with the appropriate county recorder, impart notice to all persons of their [its] contents." Utah Code Ann. Sec. 57-3-2-(1) (1953 as amended) (emphasis added).

Accordingly, since the Special Warranty Deed has remained of record since December 9, 1980, the plaintiffs are charged with constructive notice of the contents of said deed. In addition to the constructive notice, plaintiffs were put on actual notice of this defendant's interest in the property prior to any improvements, except removal of fence and placing of gravel and grass on the property. (See Affidavit of Maurice Staples R. at pp. 99-103).

B. There Is A Genuine Issue As To Whether Or Not The Dominant And Servient Parcels No Longer Abut Each Other.

The defendant, Reta Chadaz, still owns the same property which the right-of-way was established to benefit and this property abuts to the right-of-way.

The chain of title to the Chadaz property that was involved in the original sale is as follows:

1. Floyd Chadaz and Reta Chadaz conveyed by Warranty Deed to Hillam Abstracting and Insurance Agency, Inc., a Utah Corporation, Trustee, pursuant to a Trust Agreement dated the 12th day of May, 1980 (recorded in Book 331, Page 977, 5/12/80). This deed conveyed 47.12 acres. (See R. at p. 137).
2. Hillam Abstracting and Insurance Agency, Inc., conveyed by Warranty Deed to Heritage Park Partners (recorded in Book 331, Page 978, 5/12/80). This covers approximately 1.58 acres being all of the Chadaz property located on Main Street. (See R. at p. 138).

3. Heritage Park Partners conveyed by Warranty Deed to Heritage Park Plaza, Inc., a Utah Corporation (dated 10/24/80, recorded 12/9/80 at 3:05 p.m. in Book 339, Page 678 as Instrument No. 82457H). This covered 1.58 acres. (See R. at pp. 261-262 and Addendum C).

4. Heritage Park Plaza, Inc., a Utah Corporation conveyed by Special Warranty Deed to Villatek Inc., a Utah Corporation (dated 10/24/80 recorded 12/9/80 at 3:10 p.m. in Book 339, Page 680 as Instrument No. 82458H). This covered the 1.58 acres and contained the provision "Subject To A Right-Of-Way Over The East 66 Feet Of Said Property, For the Purpose Of A Proposed Road". (Emphasis added). This is where the right-of-way in question is first recorded. (See R. at pp. 146-147 and Addendum D). It is important to note the date, recording date, time of recording, book, page and instrument number of paragraphs 3 and 4 above. Both of these deeds are dated 10/24/80. The deed from Heritage Park Partners to Heritage Park Plaza, Inc. was recorded 12/9/80 at 3:05 p.m. in Book 339, Page 678 as Instrument No. 82457H. The deed from Heritage Park Plaza, Inc. to Villatek, Inc. was recorded 12/19/80 at 3:10 p.m. in Book 339, Page 680 as Instrument No. 82458H. The second deed being recorded immediately after the first.

5. Villatek, Inc. conveyed by Warranty Deed to Bradley J. Jorgensen (recorded in Book 355, Page 217 dated 2/25/82 recorded 2/26/82). There was no mention of the Right-of-Way in the conveyance. (Emphasis added). There is no further mention of the right-of-way on the county records until the Quit Claim Deed from Heritage Park Plaza, Inc. to Reta Chadaz (dated 05/02/96 was recorded 10/03/96 in Book 633, Page 1112; see R. at pp. 104-105). This covers the right-of-way only.

6. Hillam Abstracting and Insurance Agency, Inc., Trustee, conveyed by Special Warranty Deed to Floyd Chadaz (recorded in Book 349, Page 596 dated September 1, 1981 recorded September 3, 1981). This covers all of the property that had not been conveyed to Heritage Park Plaza, Inc. by Hillams as Trustee. This included approximately 35 acres adjacent to the south end of the right-of-way that is in dispute in this lawsuit.

The right of way does abut the property owned by the defendant-appellant, Reta Chadaz, and is the only direct access from her prime development property to Main Street.

C. There Is A Genuine Issue As To Whether Or Not Any Consideration Supported The Express Grant Of Easement.

The plaintiffs contend there was no consideration given by this defendant to the purchasers for the granting of this easement.

An agreement dated May 12, 1980 (See R. at pp. 124-136 and Addendum A) was entered into between Floyd Chadaz and Reta Chadaz as Sellers and Heritage Park Partners as the Buyers. This was for

the purchase of 47.12 acres of land, including the property in dispute in this case. The Buyers were unable to meet their obligations under this original agreement and were at risk of losing all of their rights under the contract. All of the Sellers' land which fronted on Main Street had already been deeded to the Buyers.

As part of the consideration for granting the Buyers additional time to perform on their contract, the Sellers entered into a Supplemental Agreement dated November 25, 1980 (See R. at pp. 139-145 and Addendum B). Part of the consideration being given by the Buyers to the Sellers was to be a reservation of a 66 foot wide roadway (see paragraph 4 of said agreement) which was stated as follows:

> "The buyer agrees that when the property fronting on Main Street, which has been released by the seller to the buyer, has been sold by the buyer to a third party there will be a reservation of a 66 foot wide roadway from Main Street to the sellers' remaining property . . ."

(See Addendum B).

It is defendant's position that there was consideration given by both parties for the Supplemental Agreement. The sellers extended the time for payments and the buyers agreed to the reservation of the easement.

D. There Is A Genuine Issue As To Whether Or Not The Defendant Chadaz Abandoned The Easement

The easement in this case was created by the reservation of the right-of-way for a road set forth in the Special Warranty Deed (See R. at pp. 263-264 and Addendum D). This is not an easement

obtained by use or prescription. Since a reservation is the creation in behalf of the grantor of a new right issuing out of the thing granted, an easement appurtenant to the grantors' remaining land may be created by reservation. A reservation of an easement is equivalent, for the purpose of creation of the easement, to an express grant of the easement by the grantee of the lands (25 Am.Jur. 2d, Easements and Licenses Section 19).

In Utah an easement or right of way may not be lost by non-use alone if it is gained by conveyance. Western Gateway Storage Co. v. Treseder, 567 P2d 181, 182 (Utah 1977). An actual intent to abandon the easement must be evident and this must be proved by clear and convincing actions releasing the ownership and right of use. Id. ". . . [N]onuse will not extinguish an easement created by express grant, no matter how long the easement has gone unused." (25 Am.Jur. 2d, Easements and Licenses, Section 114)

As previously set forth, the easement has remained of record since it was recorded on December 9, 1980. The only evidence before the court is non-use of the easement by Chadaz. This is clearly not sufficient to show an abandonment of the easement.

E. There Is A Genuine Issue As To Whether or Not Defendant Chadaz Is Barred By Equitable Estoppel From Claiming An Easement.

Whether the doctrine of equitable estoppel applies depends upon the facts and circumstances of the particular case. There can be no equitable estoppel if any essential element thereof is lacking or not satisfactorily proved.

The elements of equitable estoppel as related to the party to the estoppel, are:

1. conduct which amounts to a false representation or concealment of material facts, or, at least, which is calculated to convey the impression that the facts are otherwise than, and inconsistent with those which the party subsequently attempts to assert;

2. the intention, or at least the expectation, that such conduct shall be acted upon by, or influences the other party or other persons; and

3. knowledge, actual or constructive, of the real facts.

28 Am.Jur. 2d Estoppel and Waiver §35, (emphasis added).

The elements of equitable estoppel as related to the party claiming the estoppel, are:

1. lack of knowledge and of the means of knowledge of the truth as to the facts in question;

2. reliance, in good faith, upon the conduct or statements of the party to be estopped;

3. action or inaction based thereon of such character as to change the position and status of the party claiming the estoppel to his injury, detriment, or prejudice.

28 Am.Jur. 2d Estoppel and Waiver §35, (emphasis added).

The elements of equitable estoppel are not present in our case. There was never any representation by Reta Chadaz, that

there was no easement (See Answer of defendant to Plaintiffs' Complaint, paragraph 8, R. at p. 19). The property, consisting of the easement, was apparently purchased by the plaintiffs on July 23, 1998. (See R. at p. 7). Shortly thereafter plaintiff, Dean Potter, had been advised of the easement and had been furnished a copy of an Agreement relating to the easement (See R. at pp. 99-103). This was done prior to any improvements upon said property except the removal of a fence and placing of some gravel upon said property (See R. at p. 100 paragraph 4).

Again, plaintiffs had constructive notice of the easement, the recorded Special Warranty Deed (See R. at pp. 263-264 and Addendum D) and actual notice prior to construction on said easement (See R. at pp. 99-103). They certainly had a means of knowledge of the true facts. As to whether plaintiffs acted in good faith is certainly a fact question to be decided by the court or jury and not proper for a Summary Judgment.

F. There Is A Genuine Issue As To Whether Or Not The Easement Was An Easement In Gross And Could Not Be Transferred To Subsequent Owners.

The easement in this case is an appurtenant easement. An appurtenant easement is one whose benefits serve a parcel of land; more exactly it serves the owner of that land in a way that cannot be separated from his rights in the land. Abbott v. Nampa School District No. 181, 119 Idaho 544, 808 P.2d 1289 (Idaho 1991) (emphasis added).

The easement in this case is not an easement in gross. An easement in gross is mere personal interest in or right to the use

of the land of another. It is attached to, and vested in, the person to whom it is granted. (25 Am.Jur. 2d Easements and Licenses §11 (emphasis added)).

Whether an easement in a given case is appurtenant or in gross depends mainly on the nature of the right and the intention of the parties. (25 Am.Jur. 2d Easements and Licenses §12). Easements in gross are not favored by the courts, however, and an easement will never be presumed personal when it may fairly be construed as appurtenant to some other estate. Thus, if an easement is in its nature an appropriate and useful adjunct of the land conveyed having in view the intention of the parties as to its use, and there is nothing to show that the parties intended it to be a mere personal right, it should be held to be an easement appurtenant and not an easement in gross. If doubt exists as to its real nature, an easement is presumed to be appurtenant and not in gross. (25 Am.Jur. 2d Easements and Licenses §12).

The facts in our case are that a right of way was reserved for "a right-of-way over the east 66 feet of said property, for the purpose of a proposed road" (See R. at p. 264). There was nothing personal about the right of way; it was and still is appurtenant to the dominant tenement and necessary for direct access from Main Street to the prime development property of the defendant, Reta Chadaz.

G. There Is A Genuine Issue As To Whether Or Not The Easement Was No Longer Needed.

The easement as provided for in the Supplemental Agreement (See R. at pp. 106-111 and Addendum B) and as reserved in the

Special Warranty Deed (See R. at pp. 97-98 and Addendum D) gave to the owner of the property to the south (approximately 35 acres) direct access to Main Street. This greatly enhanced the value of the property to the South. This was true whether the buyers of the property developed it and paid it off or whether the property was returned to the sellers (Chadaz) by default.

There is nothing in the record to indicate that Tremonton City would approve the subdivision without the easement in question. The fact that the roadway was not completed with curb, gutter, sidewalks, sewer and pavement prior to October 1, 1981, certainly did not eliminate the need for the roadway. Just because part of the consideration may have failed does not mean that the balance of the consideration (the right of way itself) should fail.

The purpose of the Supplemental Agreement (See R. at p. 107 paragraph 4 and Addendum B) was to correct an oversight that had been made by Chadaz, that is, failure to reserve a right of way. The agreement was made with the then owner of the property over which the right of way was to pass. The then owner had every right to reserve a right of way for a road and that right of way could be used by any developer of the property for the purpose of developing the property.

This easement was needed then and it is still needed now.

POINT II

THE TRIAL COURT COMMITTED ERROR IN APPLYING THE LAW SO AS TO DETERMINE THERE IS NO EASEMENT IN FAVOR OF THE DEFENDANT CHADAZ OVER THE PROPERTY OWNED BY THE PLAINTIFFS.

The plaintiffs' use of several different legal theories in support of their motion for summary judgment, together with the two separate and somewhat confusing Memorandum Decisions issued by the trial court, make it difficult, if not impossible, to determine the reasoning behind the trial court's grant of summary judgment.[1] However, since none of the legal theories relied upon by the plaintiff justify a summary judgment, the trial court erred in its interpretation of the law. Set forth below are the reasons summary judgment was improper.

A. The Easement Reserved By Heritage Park Plaza, Inc. (Previously Heritage Park Partners) Was In Fulfillment Of A Contractual Obligation To Chadaz And Created A Valid Easement In Favor Of Chadaz.

Plaintiffs have argued that since Chadaz conveyed the 1.58 acres to Heritage Park Partners without reserving an easement, such an easement could not be subsequently created in favor of Chadaz. This argument is based upon the so called "stranger to the deed" legal theory and assumes that Heritage Park Plaza, Inc. was an unrelated third party which had no contractual obligations or

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[1] Neither decision relies upon any specific legal authority (other than a reference that plaintiffs' reliance on the Wade case "is not entirely justified" (see R. at p. 296)). The first decision seems to adopt plaintiffs'"shotgun" approach by summarily referring to the "reasons stated in the plaintiffs' Motion for Summary Judgment" (See R. at p. 296 and Addendum E) and the second decision briefly mentions almost every theory relied upon by plaintiffs (See R. at pp. 327-331 and Addendum F).

connections to Chadaz.

As previously set forth, Heritage Park Partners entered into an agreement with Chadaz to purchase property owned by Chadaz. After a default had occurred and before the sale was completed, a supplemental agreement was entered into between Heritage Park Partners and Chadaz wherein Heritage Park Partners specifically agreed to create an easement across the 1.58 acres in favor of Chadaz. Before this easement was created, Heritage Park Partners became Heritage Park Plaza, Inc. Heritage Park Plaza, Inc. was not an unrelated third party, but rather the successor to Heritage Park Partners.

It was the intention of both Heritage Park Plaza, Inc. and Heritage Park Partners to fulfill the obligation to Chadaz in accordance with the Supplemental Agreement. That obligation was, in fact, fulfilled when Heritage Park Plaza, Inc. reserved the 66 foot right of way in the Special Warranty Deed (See Addendum F).

This is evidenced by the following facts which were submitted to the trial court:

1. The Affidavit of James C. Kaiserman (See R. at pp. 270-272) clearly explains that: "The owners of Heritage Park Plaza, Inc. were the same as the partners of Heritage Park Partners" (See R. at p. 271 paragraph 4) (emphasis added). The Affidavit states: "The deed signed by Heritage Park Partners, grantor, to Heritage Park Plaza, Inc., as grantees, filed December 9, 1980, in Book 336, Page 678, was signed by all of the partners of

Heritage Park Partners" (See R. at p. 271 paragraph 3) (emphasis added).

2. Kaizerman's Affidavit further states, "The deed signed by Heritage Park Plaza, Inc., grantor, to Villatek Inc., grantee filed December 9, 1980, in Book 336, Page 680, was signed by James C. Kaiserman, President and attested to by Ronald Stout, Secretary." (See R. at p. 171 paragraph 5) (emphasis added).

3. The Affidavit of Clark M. Hillam (See R. at pp. 265-269) confirms that of Kaiserman as follows, "6. It is my further recollection that the Buyers, Heritage Park Partners and the owners of Heritage Park Plaza, Inc., were all the same individuals and this fact is supported by the deeds and other documents." (See R. at p. 266 paragraph 6).

4. It is clear from an examination of the two deeds referred to in the Kaiserman Affidavit (See R. at p. 271, paragraphs 3 and 5) that they were both:

(a) Dated October 24, 1980;

(b) Recorded December 9, 1980;

- one in Book 339 - Pgs. 678-679
- the other in Book 339 - Pgs. 680-681
- one as Instrument No. 82457H
- the other as Instrument No. 82458H
- one recorded at 3:05 p.m.
- the other recorded at 3:10 p.m.

It has been widely recognized that "where it appears that the property of a business operated by a partnership or individual is simply transferred to the corporation without consideration other than corporate stock issued to the partners or individuals, or the corporation is, in fact, merely a continuation of the old business under a different name, it is liable for the debts of the pre-existing business; at least a presumption arises that the corporation has assumed such debts." (18 Am.Jur. 2d Corporations §53). "A corporation organized to take over the business of a partnership or of an individual may assume the liabilities of the partnership or the individual and thereupon become liable to the partnership creditors. The assumption may, according to some authorities, be either express, or implied from the circumstances, and proved by any competent evidence which will establish it." (18 Am.Jur. 2d Corporations §54).

The plaintiffs' argument that summary judgment should be granted because Heritage Park Plaza, Inc. cannot reserve a right of way to Chadaz, who is a stranger on the deed is not justified. Plaintiffs rely on the case of "In the Matter of the Estate of Thomson v. Wade" (See R. at pp. 246-249) hereinafter referred to as Wade. The facts and rationale of the Wade case show that it simply does not apply.

In Wade the court carefully pointed out that no easement was reserved by the grantor when the land benefitted by the easement was conveyed. The grantor had failed to reserve an express easement until the time when the land burdened by the easement was

conveyed, at a time when the grantor no longer owned the land benefitted by the easement. Consequently, the court noted "[i]t is axiomatic that [the grantor] could not create an easement benefitting land which he did not own." (Wade at 310) (citations omitted).

In the case before the court, defendant, Chadaz, has always owned and still owns the land benefitted by the easement. Although the defendant, Chadaz, did convey the land burdened by the easement, she never did convey the land benefitted by the easement due to the default of the buyers, and this land has never been conveyed. After the buyers had received the land burdened by the easement, and in an express effort to salvage their attempt to purchase the land benefitted by the easement, the buyers agreed to expressly reserve the easement in the event they conveyed the land now burdened by the easement to another party. Subsequently and in accordance with this agreement, the easement was reserved even though the potential buyers were never able to complete their purchase of the land benefitted by the easement, which therefore, remained the property of the defendant, Chadaz.

Clearly, from the facts of our case, it was the intent of the partnership and the corporation, as well as Chadaz, that the corporation take over the obligation of the partnership to reserve a 66 foot right of way as provided in the Supplemental Agreement. (See R. at p. 107 paragraph 4 and Addendum B). Defendant, Chadaz, therefore, created by means of the Supplemental Agreement the express easement benefitting land which she owned. There was no

attempt to reserve an easement in favor of a third party and the rationale of the Wade case simply does not apply. Based upon the foregoing it is defendant, Chadaz's, position that the stranger to the deed concept (or the court's suggestion of third party beneficiary) does not apply to our case.

Furthermore, even if the "stranger to the deed" concept were to apply in this case, the law in Utah would not follow Wade but would follow Willard v. First Church of Christ, Scientist, Pacifica, 498 P.2d 987 (Calif. 1972), (See R. at pp. 257-259; See also copy of case R. at pp. 273-278), hereinafter referred to as Willard. That case provides that effect should be given to the grantor's intent in creating an easement. It specifically states, "In general, therefore, grants are to be interpreted in the same way as other contracts and not according to rigid feudal standards." (See R. at p. 275 right hand column). Further quotes from that case are as follows:

> "The common law rule conflicts with the modern approach to construing deeds because it can frustrate the grantor's intent. Moreover, it produces an inequitable result because the original grantee has presumably paid a reduced price for title to the encumbered property."
>
> "The highest courts of two states have already eliminated the rule altogether, rather than repealing it piecemeal by evasion. . . Since the rule may frustrate the grantor's intention in some cases even though riddled with exceptions, we follow the lead of Kentucky and Oregon and abandon it entirely."

Willard at 275, 277 (emphasis added).

The case of Aszmus v. Nelson, 743 P.2d 377 (Alaska 1987) approved "the general rule that deeds must be read to ascertain the intent of the grantor." The court then went on to approve the

rational of the Willard case, infra., and to specifically reject the Wade case relied upon by the plaintiffs. (See R. at pp. 279-282).

B. An Express And Recorded Easement Cannot Be Abandoned By Nonuse

Plaintiffs argue that any easement in favor of Chadaz was abandoned by her when she failed to build a roadway or use the easement for "over sixteen(16) years" (See R. at 61). Although an easement can be abandoned by nonuse, an easement gained by conveyance "may not be lost by non-use alone" but "an actual intent to abandon [must] be evident." Western Gateway Storage Co. v. Treseder, 567 P.2d 181, 182 (Utah 1977). Furthermore, any intent to abandon must be shown by clear and convincing actions. Id. at 182. This principle has been widely recognized by many courts. (25 Am.Jur. 2d Easements and Licenses §114).

In this case, Chadaz's easement is an express easement which was gained by conveyance from Heritage Park Plaza, Inc. It cannot be abandoned by non-use alone, and plaintiffs did not and cannot point to any undisputed "clear and convincing" actions by Chadaz evidencing any intent to abandon the easement. Summary judgment on this basis was, therefore, improper.

C. The Recording Of An Express Reservation Of Easement Imparted Notice To Plaintiffs.

Plaintiffs claim that they own the property free of Chadaz's easement since they purchased it without knowledge (actual or constructive) of the existence of an easement (see R. at p. 58). This argument completely ignores the undisputed fact that the

easement was properly recorded in the Box Elder County Recorder's Office.

§57-3-2 of the Utah Code provides, in relevant part:

> Each document executed, acknowledged, and certified, in the manner prescribed by this title . . . shall, from the time of filing with the appropriate county recorder, impart notice to all persons of their contents.

Utah Code Ann. §57-3-2 (1953 as amended) (emphasis added). Consequently, "One who deals with real property is charged with notice of what is shown by the records of the county recorder of the county in which the real property is situated." Crompton v. Jensen, 78 Ut. 55, 1 P.2d 242 (1931). "Whatever is notice enough to excite attention and put the party on his guard and call for inquiry is notice of everything to which such inquiry might have led. When a person has sufficient information to lead him to a fact, he shall be deemed conversant of it." O'Reilly v. McLean, 84 Ut. 551, 37 P.2d 770 (Utah 1934); Lawley v. Hickenlooper, 61 Ut. 298, 212 P. 526 (Utah 1922); Wood v. Carpenter, 101 U.S. at page 141, 25 L. Ed. 807.

The reservation of the right of way was dated October 24, 1980, recorded December 9, 1980, in Book 339, Pages 680-681, Instrument No. 82458H, at 3:10 p.m. (See R. at pp. 25-26 and Addendum D). The filing of the Special Warranty Deed subject to the reservation of the right of way was sufficient to impart notice to all persons, including plaintiffs, from the date of the recording. Plaintiffs cannot be bona fide purchasers without notice, and summary judgment on this legal theory was not proper.

D. The Doctrine Of Equitable Estoppel Does Not Extinguish Chadaz's Express And Recorded Easement.

Plaintiffs claim that Chadaz is barred from claiming her easement by the doctrine of equitable estoppel (See R. at P. 62). In making such a claim, plaintiffs again ignore the fact that Chadaz's easement had been expressly conveyed and recorded.

With respect to the doctrine of estoppel in connection with interests in real estate, "it is generally well established that a person cannot assert an estoppel on the basis of the failure of an owner of an interest in real estate to disclose such interest while the aggrieved party was carrying on some transaction relating to such property, if the person seeking to establish the estoppel has failed to avail himself of the constructive notice afforded by the public records." (28 Am.Jur. 2d Estoppel and Waiver §96). In this regard, "[w]hen the avenues of information are equally open to both parties, there will be no bar. Nor is the party holding the title bound to seek the other and inform him of his rights when he is in no default. The owner of land, having his title duly recorded, has given all the information to the purchaser which the law requires." 28 Am.Jur. 2d. Estoppel and Waiver §90 N. 12 (1966) (emphasis added); Mills v. Graves, 38 Ill. 455; See also Porter v. Wheeler, 17 So. 221. Additionally, " . . . the mere fact that a person has ascertained that a transaction relative to property in which he has an interest is contemplated by other parties does not impose upon him the duty of disclosing that interest. The nonexistence of any duty under such circumstance is inferable for an additional reason where the nature and extent of the interest held by the party

sought to be estopped are ascertainable by an inspection of the public records. Indeed, because of the doctrine of constructive notice, there is little duty outside the avoidance of affirmative misleading acts, which is imposed upon the holder of an interest in real property, which interest is disclosed by the public record." 28 Am.Jur. 2d Estoppel and Waiver §90 (emphasis added).

There is no factual dispute that the reservation of the right of way was made a matter of record December 9, 1980 (See R. at pp. 25-26 and Addendum D). The plaintiffs purchased the land in question on or about July 23, 1993 (See R. at p. 7), and therefore, had constructive notice of the easement. With such notice, plaintiffs cannot use the doctrine of estoppel to avoid Chadaz's easement.

E. The Conveyance Of The Property By Villatek Without Reservation Of Chadaz's Easement, Did Not Extinguish The Easement.

Villatek could not convey away more than it had. It received the property by Special Warranty Deed (See R. at pp. 25-26 and Addendum D). It was "Subject To A Right-Of-Way Over The East 66 Feet Of Said Property, For The Purpose Of A Road." Villatek conveyed the property away by Warranty Deed (See R. at p. 169-170). There was no mention of the Right-of-Way in this conveyance. Villatek's failure to mention the right of way clearly cannot and should not destroy the right of way.

It is noted here that "First American Title Ins. Co. (on Title Policy)" was named as a party defendant. Attention is called to the transcript of videotaped hearing pg. 31 lines 1-17:

"The Court: Before you leave that, I assume he purchased this land with title coverage?"

"Mr. Grant: Yes."

"The Court: Why is the title insurance carrier not a party?"

"Mr. Grant: They are."

"Mr. Hadfield: They have paid. Your Honor."

"The Court: I assumed that might be the case. It raises a question of equity, then, but go ahead."

"Mr. Hadfield: The question is why did they pay, also?"

"The Court: I don't know whether that should control the court."

"Mr. Hadfield: No. it does not.

"The Court: But the fact that they paid may affect the issue relative to equity. But go ahead."

It is obvious the title insurance company did not believe that Villatek's failure to mention the Right-of-Way in its conveyance did, in fact, do away with the right of way.

The fact that the title company failed to mention the "right-of-way" in its title policy does not help the plaintiffs. The right of way was a matter of record and the fact that it was not mentioned in the title policy was not the fault of the defendant, Chadaz.

F. The Easement Reserved By Heritage Park Plaza, Inc. Was In Consideration Of The extension Of The Sales Agreement Between Chadaz And Heritage Park Partners, And The Subsequent Default On The Supplemental Agreement Does Not Nullify The Easement

The parties negotiated a Supplemental Agreement dated November 25, 1980, which Supplemental Agreement contained the following provision in paragraph 4:

> "The buyer agrees that the property fronting on Main Street, which has been released by the seller to the buyer, has been sold by the buyer to a third party that there will be a reservation of a 66 foot wide roadway from Main street to the seller's remaining property . . ."

(See R. at p. 107 and Addendum B). This provision of the agreement was fulfilled by the buyer (Heritage Park Plaza,Inc. formerly Heritage Park Partners). On December 9, 1980 the Special Warranty Deed (See R. at pp. 25-26 and Addendum D) was recorded, which deed described a parcel of ground containing 1.58 acres and underneath the description provided as follows: "Subject To A Right-Of-Way Over The East 66 Feet Of Said Property For The Purpose Of A Proposed Road."

Clearly the most important purpose of the right of way for a road was to maintain an access to Main Street for the balance of the property lying to the south of said right of way. The fact that the then current developer did not construct a road did not diminish the importance of the right of way to the owners of the property to the south or to any future prospective developer. It is still as important and necessary today as it was when it was created. The buyers (Heritage Park Plaza, Inc. formerly Heritage Park Partners) gave up an easement in consideration of Chadaz

allowing an extension or alternative to the default. The subsequent default on the Supplemental Agreement cannot and does not affect this bargained for exchange.

POINT III

THE TRIAL COURT SHOULD HAVE AMENDED OR MADE ADDITIONAL FINDINGS IN GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The trial court in its first Memorandum Decision dated September 19, 1997 held:

> "Without reciting all of the issues and the basis for decision, the court acknowledges that perhaps holding the Wade case (In the Matter of the Estate of: Thompson v. Wade, 509 N.E. 2nd 309 (New York 1987) is not entirely justified, but neither is the Defendant's' reliance helpful. 'Stranger to the deed' principles are not particularly beneficial to either party."
>
> "For the reasons stated in the Plaintiff's Motion for Summary Judgment, the same is granted. The motion for Summary Judgment filed by Defendant is denied. Counsel for the Plaintiff is directed to prepare a formal Order in conformance herewith.

(See R. at pp. 295-296 (emphasis added and Addendum E). Unfortunately, plaintiffs had raised at least eleven different points in their Motion for Summary Judgment (See R. at pp. 302-303).

When the court ruled, "for the reasons stated in the plaintiffs' motion . . . the same is granted", Chadaz was left in a complete dilemma as to the basis of the court's ruling. Consequently, the defendant filed her Verified Motion For Amendment To Memorandum Decision, together with Memorandum of Points and Authorities. (See R. at pp. 298-307).

The trial court's second Memorandum Decision dated October 21, 1997 (see R. at pp. 367-331 and Addendum F), while elaborating on some points, still concluded, "as stated in the Court's original Order in this case and as found in the original Memorandum Decision, the Motion for Summary Judgment brought by the Plaintiffs is granted and this Memorandum Decision will serve only as a supplement thereto. No further Order need be submitted nor entered." (See R. at pp. 327-330, the last paragraph and Addendum F). The defendant, Chadaz, has thus been left to attempt to respond to "For the reasons stated in the Plaintiff's motion . . . the same is granted." This has resulted in a very arduous undertaking.

As set forth in Rule 52(a), the trial court is required to issue a brief written statement of the grounds for its decision on all motions granted under Rule 56 when the motion is based on more than one ground. According to the Utah Supreme Court, this requires more than a blanket reference to the plaintiffs' Motion for Summary Judgment. Retherford v. AT&T Communications, 844 P.2d 949 (Utah 1992) Allen v. Prudential Property and Cas. Ins., 839 P.2d 798 (Utah 1992). (See R. at pp. 322).

In the Retherford case the Utah Supreme Court, in an opinion authored by Justice Zimmerman, held:

> "Such a blanket statement provides us with no guidance as to the trial court's reasoning. It therefore does not comply with rule 52(a) of the Utah Rules of Civil Procedure which requires trial judges to issue brief written statements of their grounds for granting summary judgment when multiple grounds are presented. See Utah R.Civ.P.52(a). Although failure to issue a statement of grounds is not reversible error absent

> unusual circumstances, we take this opportunity to remind trial judges that the presumption of correctness ordinarily afforded trial court rulings "has little operative effect when members of this court cannot divine the trial courts reasoning because of the cryptic nature of its ruling."

(Retherford at 958(fn.4) (citations omitted).

It is defendant's position that in the words of the court ". . . the presumption of correctness ordinarily afforded trial court rulings "has little operative effect when members of this court cannot divine the trial court's reasoning because the cryptic nature of its ruling".

Defendant's understanding of the law is that failure to object or to file a Motion For Amendment To Memorandum Decision under Rule 52(b) would have precluded the Court of Appeals from considering the error on appeal. Alford v. Utah League of Cities and Towns, 791 P.2d 201 (Utah App. 1990).

CONCLUSION

This court should remand this case to the District Court for a trial on its merits. The defendant, Chadaz, is entitled to present her case to a jury based upon all the evidence that may be properly admitted. It is improper for her case to be decided summarily. The defendant should be awarded her costs and expenses of this appeal.

DATED this 17th day of June, 1998.

MANN, HADFIELD & THORNE

By _____
Reed W. Hadfield

By _____
Stephen R. Hadfield

CERTIFICATE OF SERVICE

I, Reed W. Hadfield, certify that on the 17th day of June, 1998, I served two copies of the attached "BRIEF OF APPELLANT RETA CHADAZ", upon Marlin J. Grant, the counsel for the appellee in this matter, and I served two copies of the attached "BRIEF OF APPELLANT RETA CHADAZ" upon Gary Bywater, defendant, and two copies upon Karleen C. Bywater, defendant, by mailing them to them by first class mail with sufficient postage prepaid to the following addresses:

Marlin Grant
88 West Center
P. O. Box 525
Logan, Utah 84323-0525

Gary Bywater
375 North 600 West
Brigham City, Utah 84302

Karleen C. Bywater
375 North 600 West
Brigham City, Utah 84302

MANN, HADFIELD & THORNE

By _____
Reed W. Hadfield
Attorneys for Defendant/Appellant

tr/1:chadaz.brf

ADDENDUM

A. Agreement dated May 12, 1980

B. Supplemental Agreement dated November 25, 1980

C. Warranty Deed - Heritage Park Partners to Heritage Park Plaza, Inc.

D. Special Warranty Deed - Heritage Park Plaza, Inc. to Villatek Inc.

E. Memorandum Decision dated September 19, 1997

F. Memorandum Decision dated October 21, 1997

ADDENDUM A

ADDENDUM A

AGREEMENT

This agreement made and entered into by and between FLOYD CHADAZ and RETA CHADAZ, his wife, of Tremonton, Utah, hereinafter referred to as the seller, and HERITAGE PARK PARTNERS, a Utah Partnership consisting of MAX D. FRAUGHTON, and JAMES C. KAISERMAN of Kaysville, Utah, hereinafter referred to as the buyer.

WITNESSETH:

THAT WHEREAS the seller is the owner of certain real property situate in Box Elder County, Utah, and more particularly described as set forth in Schedule 1 attached hereto and made a part hereof by reference, and the buyer desires to purchase the same for the sum of $681,250.00 upon certain terms and conditions as hereinafter set out,

NOW, THEREFORE for and in consideration of the mutual promises, covenants and agreements to be performed and kept by each with the other as hereinafter set out, the seller hereby sells and the buyer hereby purchases the above described property on the following terms and conditions to-wit:

1. The purchase price will be $681,250.00 which shall be paid as follows: The sum of $60,000.00 on or before March 31, 1980, receipt of which sum is hereby acknowledged by the seller, and the balance of $621,250.00 shall be paid as follows: The sum of $40,000.00 on or before September 1, 1980, together with interest on the said $40,000.00 at the rate of 15% per annum, with said interest to commence April 1, 1980 and to continue until the $40,000.00 has been paid. The sum of $100,000.00 on, but not before January 5, 1981. The balance of $481,250.00, plus interst at the rate of 10% per anum, which interest shall commence January 5, 1981, shall be amortized over a ten year period with an annual payment of $78,321.00 to be paid on the 5th day of January, 1982, with a like amount becoming due and payable on the 5th day of

January each succeeding year until January 5, 1991, at which time the entire balance owing hereunder shall be due and payable. The annual payment of $78,321.00 includes both interest and principal. It being specifically agreed that commencing with the calendar year 1982 the buyer shall have the option to pay up to but not more than $100,000.00 principal, plus accrued interest, in any one calendar year. It being specifically provided, however, that an annual payment of $78,321.00 must be made each year regardless of whether or not any prepayments have been made. It is further agreed that the parties hereto may mutually agree to negotiate higher annual payments, provided that such would be agreeable to both parties and that a supplemental agreement in writing to that effect be signed by each of the parties hereto.

2. The possession of said premises shall be delivered by the seller to the buyer on the 31st day of March, 1980.

3. The buyer agrees to pay all taxes and assessments levied against said property after April 1, 1980 as the same become due and payable, and the seller agrees to pay all taxes and assessments levied prior to April 1, 1980.

4. The sale price of $681,250.00 as set forth herein is based on the fact that seller herein shall obtain a survey of said property which will show, and be verified, that the seller can provide marketable title to buyer of a minimum of 45.75 acres of land, which survey shall be paid for and provided by seller. In the event such survey shows less than 45.75 acres to which seller can provide marketable title, then the said purchase price shall be adjusted downward at the rate of $15,000.00 per acre, or any portion of an acre, to which seller cannot provide marketable title. In the event such survey shall show that seller can provide marketable title to more than 45.75 acres, then the said purchase price of $681,250.00 as set forth herein shall remain, and buyer shall then be entitled to all acreage, upon final payment hereunder, to which seller is now in possession. In the

event any fence line or any boundary of said property shall be within seller's possession, but not within seller's record title, seller shall have a period of one year from the date of this contract to attempt to clear the title to said portion of said property, and upon clearing title thereto within such period shall be entitled to payment therefor provided such portion shall be necessary to comply with the 45.75 acre minimum provision herein contained. In the event such title cannot be cleared within the one year period specified, seller agrees to quit-claim any such possessory rights as they may have to buyer without further consideration.

A. In the event such acreage shall be less than the 45.75 acres set forth in the above paragraph, the payments due September 1, 1980 and January 5, 1981 shall be and remain as set forth, and all subsequent payments commencing January 5, 1982 shall be reduced accordingly so that the remaining balance, plus interest, shall be amortized over the 10 payments commencing January 5, 1982, and continuing until January 5, 1991, when all amounts owing hereunder shall be due and payable.

5. The seller agrees to pay a commission of 10% of the amount of the purchase price as finally established to Southwick Realty, Inc., and to Bill Brown Realty Inc., which commission shall be payable 30% at the time of closing on March 31, 1980, 20% when the September 1, 1980 payment is made, and the balance of 50% at the time of payment of the payment due January 5, 1981. The seller agrees to save and hold buyer harmless from any claim for such commissions.

6. The payment due March 31, 1980 in the sum of $60,000.00, the payment due September 1, 1980 in the sum of $40,000.00, and the payment due January 5, 1981 in the sum of $100,00.00 are each to be applied to the payment of principal. The annual payments commencing January 5, 1982 and becoming due and payable on the 5th day of January of each year thereafter, are to be applied first to the payment

of interest and second to the reduction of the principal. Interest shall be charged from January 5, 1981 on all unpaid portions of the purchase price at the rate of 10% per annum. The buyer shall not have the right to make payments in excess of those herein set out except as specifically set forth in paragraph 1.

7. It is understood and agreed that if the seller accepts payment from the buyer on this contract less than according to the terms herein mentioned, then by so doing, it will in no way alter the terms of the contract as to the forfeiture hereinafter stipulated or as to any other remedies of the seller.

8. It is understood that there are no outstanding obligations against said property at the present time.

9. Seller represents that there are no unpaid special improvement district taxes covering improvements to said premises now in the process of being installed, or which have been completed and not paid for, outstanding against the property, except for assessments made by the Tremonton-Garland Drainage District which assessments the buyer herein agrees to pay.

10. The seller is given the option to secure, execute and maintain loans secured by said property of not to exceed the then unpaid contract balance hereunder, bearing interest at the rate of not to exceed 10% per annum and payable in regular monthly installments; provided that the aggregate annual installment payments required to be made by seller on said loans shall not be greater than each installment payment required to be made by the buyer under this contract. When the principal due hereunder has been reduced to the amou of any such loans and mortgages the seller agrees to convey and the buyer agrees to accept title to the above described property subject to said loans and mortgages.

11. The buyer agrees upon written request of the seller to make application to a reliable lender for a loan of such amount as can be secured under the regulations of said lender and hereby agrees to apply any amount so received upon the purchase price above mentioned, and to execute the papers required and pay one-half the expenses necessary in obtaining said loan, the seller agreeing to pay the other one-half, provided however, that the annual payments and interest rate required shall not exceed the annual payments and interest rate as outlined above.

12. The buyer agrees to pay all taxes and assessments of every kind and nature which are or which may be assessed and which may become due on these premises during the life of this agreement. The seller hereby covenants and agrees that there are no assessments against said premises at the present time. The seller agrees to pay and clear all Green-Belt Amendment Roll Back Taxes as parcels are conveyed to the buyer hereunder, or its assigns. The seller further convenants and agrees that he will not default in the payment of his obligations against said property. The seller and buyer both recognize the existence of the fact that said property is now being assessed under the Green-Belt Amendment, and is subject to any claim of Box Elder County for deferred taxes as a result of such assessment. The parties hereto agree to cooperate, each with the other, to attempt to retain so much of said property under said assessment as may be possible, and as may qualify, from year to year. However, in the event of any change of use of any portion of said property, either by buyer, or by their successors or assigns, which would necessitate the withdrawal of that portion from the Green-Belt Assessment, and the payment of all deferred taxes thereon, seller agrees to pay any and all amounts, upon receipt of request from buyer, which may be necessary to clear such portion from the effect of said assessment up to the date of this contract, and buyer

shall assume all responsibility for payment of any such deferred taxes which may result from the continuation of such Assessment from and after the date of this contract.

13. It is fully understood and agreed that all water rights appurtenant to said tracts of real property conveyed herein shall be and remain the property of the seller. That no water rights are being conveyed hereunder. The seller specifically agrees to pay all water assessments levied or attached against said water rights or the real property herein to be conveyed.

14. The buyer agrees to pay the general taxes after March 31, 1980.

15. In the event the buyer shall default in the payment of any special or general taxes or assessments as herein provided, the seller may, at his option, pay said taxes and assessments, or either of them, and if seller elects so to do, then the buyer agrees to repay the seller upon demand all such sums so advanced and paid by him, together with interest thereon from date of payment of said sums at the rate of 1% per month until paid.

16. Buyer agrees that he will not commit or suffer to be committed any waste, spoil, or destruction in or upon said premises, and that he will maintain said premises in good condition.

17. Seller agrees to release parcels of property to the buyer upon the following basis:

A. Any reference hereinafter contained to the "north portion of said property" shall be construed to be that portion of said property lying north of the centerline of Second South Street extended easterly to the east line of said property, and any reference hereinafter contained to the "south portion of said property" shall be construed to be that portion of said property lying south of the center line of Second South Street extended easterly to the east line of said property.

B. Seller agrees, upon receipt of the down payment to be made by buyer on or before March 31, 1980, to convey to buyer, his successors or assigns, a tract of land which shall encompass either three (3) acres in the north portion of said property, or 4.5 acres in the south portion of said property, or any proportionate amount in either the north portion or the south portion of said property based upon $20,000 per acre for the north portion and $13,333.33 for the south portion, which election shall be made solely at the discretion of the buyer, his successors or assigns.

C. Seller agrees, upon receipt of the payment due September 1, 1980, to convey to buyer, his successors or assigns, 2.0 acres in the north portion of said property or 3.0 acres in the south portion of said property, or any proportionate amount in either the north portion or the south portion of said property based upon $20,000 per acre for the north portion and $13,333.33 for the south portion, which election shall be made solely at the discretion of the buyer, his successors or assigns.

D. Upon payment by buyer to seller of the $100,000.00 due January 5, 1981, seller further agrees to convey to buyer, or his successors or assigns, an additional five (5) acres in the north portion of said property, or an additional 7.5 acres in the south portion of said property, or any proportionate amount in either the north portion or the south portion of said property based upon $20,000 per acre for the north portion and $13,333.33 for the south portion; location of which shall be solely at the discretion of the buyer, his successors or assigns.

E. Additional acreage will be conveyed by seller to buyer upon request of the buyer on the basis of $25,000.00 per acre for the north portion of said property, and on the basis of $15,000.00 per acre for the south portion of said property. Such acreage figures shall be calculated only as the principal balance is reduced by such amounts, and any application of any amount of any payment to the payment of interest shall not be construed as entitling buyer, his successors or assigns to a conveyance of any land for such

interest payment. It is fully understood and agreed as recited in paragraph 6 of this contract that buyer, his successors or assigns, may not prepay any amounts except as specifically set forth in the said paragraph 1. It being specifically understood that should the buyer make accelerated payments as provided for in paragraph 1, buyer would be entitled to conveyances for any such amounts prepaid as they would be applied to the reduction of principal on the basis of the price per acre set forth herein. Any prepayment shall be applied to the end of the contract, and the buyer shall be required to make annual payments as herein set forth each year until the entire contract has been paid in full.

F. Conveyances to buyer by seller of any acreage under the foregoing provisions shall be made with the provisos that seller shall be relieved of such responsibility to do so in the event of (1) any payment due hereunder being delinquent, and not being brought current to the date of such conveyance, or (2) seller shall have the right to retain such portions of said land as may be reasonably necessary for ingress and egress to and from the remaining land of seller, or (3) that seller shall have the right to determine that such remaining land which is not conveyed shall be and act as sufficient security for the balance of any amounts remaining owing under the terms of this contract.

G. In order to carry out the terms and conditions of this agreement, the parties hereto mutually agree that title to the property covered by this agreement shall be placed in trust with Hillam Abstracting & Insurance Agency, Inc. which trust shall be subject to the terms and conditions of this agreement, and the Trustee shall be bound by the terms and conditions of this agreement.

18. Buyer hereby gives the right to seller to farm any portion of the land covered by this contract during the term of this contract, without consideration therefore, subject to the provisos that (a) in the event any tract of land which seller is farming is sold by buyer herein, or (b) in the event any portion of such land shall be needed, as solely

determined by buyer, his successors or assigns, for development purposes, buyer, nor his successors, shall assume no obligation as to any damage which may be created to crops which may be planted by seller, nor shall buyer, his successors or assigns, have any liability to seller for any such damage or for any crops which may be destroyed in the process of such development, or in the preparation of any portion of said land for development purposes, or for any purpose which may be related to such development. It is the intent and purpose of these provisos that seller shall conduct any such farming at his own risk, and shall assume any and all risk of loss which may be inherent or caused by the development of said land, or any portion thereof.

19. In the event of failure to comply with the terms hereof by the buyer, or upon failure of the buyer to make any payment or payments when the same shall become due, or within thirty (30) days thereafter, the seller, at his option shall have the following alternative remedies:

A. Seller shall have the right, upon failure of the buyer to remedy the default within five (5) days after written notice, to be released from all obligations in law and in equity to convey said property, and all payments which have been made theretofore on this contract by the buyer, shall be forfeited to the seller as liquidated damages for the non-performance of the contract, and the buyer agrees that the seller may at his option re-enter and take possession of said premises without legal process as in its first and former estate, together with all improvements and additions made by the buyer thereon, and the said additions and improvements shall remain with the land and become the property of the seller, the buyer becoming at once a tenant at will of the seller. It being specifically provided that in the event the seller exercises this option A that they will give written notice ten days prior to the exercise of said option to anyone showing a recorded interest in and to the property covered by this agreement; or

B. The seller may bring suit and recover judgment for all delinquent installments, including costs and attorneys fees. (The use of this remedy on one or more occasions shall

not prevent the seller, at his option, from resorting to one of the other remedies hereunder in the event of a subsequent default); or

C. Seller shall have the right, at his option, and upon written notice to the buyer to declare the entire unpaid balance hereunder at once due and payable, and may elect to treat this contract as a note and mortgage, and pass title to the buyer subject thereto, and proceed immediately to foreclose the same in accordance with the laws of the State of Utah, and have the property sold and the proceeds applied to the payment of the balance owing, including costs and attorneys fees; and the seller may have a judgment for any deficiency which may remain. In the case of foreclosure, the seller hereunder, upon the filing of a complaint, shall be immediately entitled to the appointment of a receiver to take possession of said mortgaged property and collect the rents, issues and profits therefrom and apply the same to the payment of the obligation hereunder, or hold the same pursuant to order of the court; and the seller, upon entry of judgment of foreclosure, shall be entitled to the possession of said premises during the period of redemption.

20. It is agreed that time is the essence of this agreement.

21. In the event there are any liens or encumbrances against said premises other than those herein provided for or referred to, or in the event any liens or encumbrances other than herein provided shall hereafter accrue against the same by acts or neglect of the seller, then the buyer may, at his option, pay and discharge the same and receive credit on the amount then remaining due hereunder in the amount of any such payment or payments and thereafter the payments herein provided to be made, may, at the option of the buyer, be suspended until such time as such suspended payments shall equal any sums advanced as aforesaid.

22. The seller on receiving the payments herein reserved to be paid at the time and in the manner above mentioned agrees to execute and deliver to the buyer or assigns, a good and sufficient warranty deed conveying the title to the above described premises free and clear of all encumbrances except as herein mentioned and except as may have accrued by or through the acts or neglect of the buyer, and to furnish at his expense, a policy of title insurance in the amount of the purchase price.

23. The buyer and seller each agree that should they default in any of the covenants or agreements contained herein that the defaulting party shall pay all costs and expenses including a reasonable attorneys fee, which may arise or accrue from enforcing this agreement, or in obtaining possession of the premises covered hereby, or in pursuing any remedy provided hereunder or by the statutes of the State of Utah whether such remedy is pursued by filing suit or otherwise.

24. It is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, successors, and assigns of the respective parties hereto.

IN WITNESS WHEREOF, the said parties have signed their names this 12th day of May, 1980.

Signed in the presence of:

Floyd Chadaz

Reta Chadaz
Seller

Signed in the presence of:

HERITAGE PARK PARTNERS, A Utah Partnership

Max D. Fraughton, individually and as a partner

James C. Kaiserman, individually and as a partner

STATE OF UTAH)
:ss
COUNTY OF BOX ELDER)

On the 12th day of May, 1980, personally appeared before me Floyd Chadaz and Reta Chadaz, his wife, signers of the within instrument, who duly acknowledged to me that they executed the same.

Notary Public
Residing at Brigham City, Utah

My Commission Expires
January 8, 1982

STATE OF UTAH)
:ss
COUNTY OF Box Elder)

On the 12th day of May, 1980, personally appeared before me Max D. Fraughton, and James C.Kaiserman, individually and as partners of Heritage Park Partners, a Utah Partnership, who duly acknowledged to me that they executed the within instrument.

Notary Public
Residing at: Brigham City Utah

My Commission Expires

Jan 8, 1982

Schedule 1

Beginning at a point 54.4 feet South of the N.E. corner of the N.W. ¼ of Section 10, T. 11 N., R. 3 W., S.L.B. & M. and running East 30.0 feet; the ce South 830.8 feet; thence N 88°37'35" E 183.6 feet; thence South 161.5 feet; thence N 88°37'35" E 103.7 feet; the ce S 5°30' W 337.3 feet; thence N 88°37'35" E 50.0 feet; thence S 5°30' W 851.3 feet; thence on a curve to the right of 500 foot radius a distance of 725.4 feet (Note: Chord of said curve bears S 50°05'W 624.8 feet); thence S 88°37'35" W 423.2 feet along an established fence which is paralell to the Half-Section line and 50 feet North therefrom; thence N 0°04'10" E 2563.4 feet; thence N 88°37'35"E 236.0 feet; thence South 191.3 feet; thence N 88°37'35" E 410.0 feet; thence North 191.0 feet to the point beginning, containing 47.12 acres.

The seller reserves the right to remove the two steel granaries located upon the above described property.

ADDENDUM B

ADDENDUM B

SUPPLEMENTAL AGREEMENT

This agreement made and entered into by and between FLOYD CHADAZ and RETA CHADAZ, his wife, of Tremonton, Utah, hereinafter referred to as the seller, and HERITAGE PARK PARTNERS, a Utah Partnership consisting of MAX D. FRAUGHTON and JAMES C. KAISERMAN, partners and individually, and TRIPLE "S" DEVELOPMENT, INC., a Utah Corporation, RONALD W. STOUT, GERALD E. STOUT and GARY V. SMITH, hereinafter referred to as buyer.

WITNESSETH:

THAT WHEREAS the seller entered into an agreement to sell certain real property to Heritage Park Partners, a Utah partnership consisting of Max D. Fraughton, James C. Kaiserman and James E. Oldham, which agreement is dated the 6th day of May, 1980, and

WHEREAS Max D. Fraughton entered into an agreement whereby he sold to Triple "S" Development Inc., a Utah corporation, his entire interest in Heritage Park Partnership, which agreement was dated June 30,1980, and

WHEREAS Ronald W. Stout, Gerald E. Stout, and Gary V. Smith entered into a personal guarantee of the agreement between Fraughton and Triple "S" Development Inc., which guarantee is dated June 30, 1980, and

WHEREAS Heritage Park Partners, a Utah partnership consisting of Max D. Fraughton, James C. Kaiserman and James E. Oldham have been unable to meet their requirements for payment pursuant to their agreement dated the 12th day of May, 1980, in that the $40,000.00 which was to have been paid on or before September 1, 1980, together with interest on said amount at the rate of 15% per annum, has not been paid, and

WHEREAS it appears necessary that if the property sold by Chadaz's is to be developed as intended by Heritage Park Partners, that additional time is necessary in order for the buyers to obtain the necessary financing,

NOW, THEREFORE for and in consideration of the mutual promises, covenants and agreements to be performed and kept by each with the other as hereinafter set out, it is hereby agreed between the parties to this supplemental agreement as follows:

1. The seller hereby extends to the buyer the time within which to make the $40,000.00 payment which was to have been made on September 1, 1980, so that said payment shall now become due and payable March 1, 1981, on which date the $40,000.00 together with interest on said $40,000.00 (at the rate of 15% per annum; said interest to commence April 1, 1980 and continue until the $40,000.00 has been paid) shall be due and payable.

2. The time within which to pay the $100,000.00 payment which was to have been paid on January 5, 1981 is hereby extended to August 1, 1981. It being specifically understood and agreed that interest at the rate of 12% per annum shall be paid on said $100,000.00 with said interest to commence January 5, 1981, and to continue until the $100,000.00 has been paid in full.

3. The buyer specifically agrees to take any and all action that may be necessary or desirable in order to complete the development and to obtain the financing necessary to comply with the terms and conditions of their purchase agreement with the seller. The buyer specifically agrees to take the following action:

(a) File with the Farmers Home Administration application for a loan guarantee on 2.2 million dollars, which application has been filed prior to the execution of this supplemental agreement.

(b) To file for a loan of interim financing and the sale of industrial revenue bonds with Commercial Security Bank, and buyer represents to the seller that this action has already been taken.

(c) To make best effort to have preliminary plans and a preliminary plat approved by the Planning Commission and City Council of Tremonton prior to February 1, 1981.

(d) To have completed and make available for inspection preliminary drawings and costs estimates on the development project prior to February 1, 1981.

(e) To do everything possible to obtain tenative approval from the Farmers Home Administration, and from Commercial Security Bank prior to February 1, 1981.

(f) Do everything possible to obtain final approval from Farmers Home Administration and Commercial Security Bank prior to April 1, 1981. This is to include final drawings and a construction contract.

(g) Take whatever action may be necessary in order to begin construction prior to May 1, 1981.

4. The buyer agrees that when the property fronting on main street, which has been released by the seller to the buyer, has been sold by the buyer to a third party that there will be a reservation of a 66 foot wide roadway from Main Street to the seller's remaining property. It being specifically provided that this roadway will be complete with curb, gutter, sidewalks, sewer, and pavement, and shall be completed prior to October 1, 1981. The buyer shall also obtain or reserve an easement or other reservation so that the seller (Floyd and Reta Chadaz) can pipe their irrigation water in the existing ditch along the west property line of the property that has been released to the property that has not been released. But that buyer or third party shall have to pay no part of the costs.

5. The buyer agrees to develop and sell the ~~seven~~ SIX lots on the south side of the property which have already been released to the buyer. It being specifically provided that the buyer shall construct a 60-foot wide improved paved road with all utilities furnished and stubbed to property at the approximate location as shown

on the attached conceptual plat. It being specifially provided that all expenses in connection with this road will be paid by the buyer, and that said road will provide access to the remainder of the seller's property. This road shall be completed prior to October 1, 1981.

6. It is specifically understood and agreed that this agreement is supplemental to that certain agreement made and entered into on the 12th day of May, 1980 between Floyd Chadaz and Reta Chadaz, seller, and Heritage Park Partners, a Utah partnership consisting of Max D. Fraughton, James C. Kaiserman, and James E. Oldham, partners and individually, and that said original agreement shall remain in full force and effect except as herein specifically modified.

7. Max D. Fraughton, James C. Kaiserman, James E. Oldham, Ronald W. Stout, Gerald E. Stout and Gary V. Smith each agree that they are personally and individually responsible and liable for the true and faithful performance of this supplemental agreement and also all of the terms and conditions of that certain agreement made and entered into on the 12th day of May, 1980 between Floyd Chadaz and Reta Chadaz and Heritage Park Partners.

8. Heritage Park will pay legal fees to prepare this agreement.

9. Heritage Park Partners will provide a copy of road improvement agreement.

10. This supplemental agreement shall be binding upon the heirs, personal representatives and assigns of each of the parties hereto and should any party default in any of the terms, covenants and conditions of this supplemental agreement the defaulting party agrees to pay all costs and expenses of enforcing this agreement including reasonable attorneys fees.

DATED this 25th day of November, 1980.

SELLER

Floyd Chadaz

Floyd Chadaz

Reta Chadaz

Reta Chadaz

BUYER

HERITAGE PARK PARTNERS

By _____
Max D. Fraughton, partner

By _____
James C. Kaiserman, partner

By _____
James E. Oldham, partner

_____
Max D. Fraughton, individually

_____
James C. Kaiserman, individually

_____
James E. Oldham, individually

TRIPLE "S" DEVELOPMENT INC.
A Utah Corporation

By _____
Ronald W. Stout, President

_____
Ronald W. Stout, Individually

_____
Gary V. Smith, individually

_____

STATE OF UTAH)
:ss
COUNTY OF BOX ELDER)

On the 26th day of November, 1980, personally appeared before me Floyd Chadaz and Reta Chadaz, his wife, signers of the within instrument, who duly acknowledged to me that they executed the same.

_____
Notary Public
Residing at Brigham City, Utah

My Commission Expires
January 8, 1982

STATE OF UTAH)
:ss
COUNTY OF Davis)

On the 25th day of November, 1980, personally appeared before me Max D. Fraughton, James C.Kaiserman, and James E.Oldham, partners of Heritage Park Partners, signers of the within instrument, who duly acknowledged to me that they executed the same.

Gerald B. Kirkpatrick
Notary Public
Residing at: Kaysville, Utah

My Commission Expires

12 - Aug. 1981

STATE OF UTAH)
:ss
COUNTY OF Davis)

On the 25th day of November, 1980, personally appeared before me Max D. Fraughton, James C. Kaiserman, and James E. Oldham, individually, signers of the within instrument, who duly acknowledged to me that they executed the same.

Gerald B. Kirkpatrick
Notary Public
Residing at: Kaysville, Utah

My Commission Expires

12 Aug. 1981

STATE OF UTAH)
:ss
COUNTY OF Davis)

On the 25th day of November, 1980, personally appeared before me Ronald W. Stout and Gary V. Smith who being by me duly sworn did say, each for himself, that he, the said Ronald W. Stout is the president, and he, the said Gary V. Smith is the secretary of Triple "S" Development Inc., a Utah Corporation, and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors and said Ronald W. Stout and Gary V. Smith each duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.

Gerald B. Kirkpatrick
Notary Public
Residing at: Kaysville Ut.

My Commission Expires

12 Aug - 1981

STATE OF UTAH)
:ss
COUNTY OF)

On the 25-th day of November, 1980, personally appeared before me Ronald W. Stout, Gerald E. Stout, and Gary V. Smith, individually, signers of the within instrument who duly acknowledged to me that they executed the same.

Gerald B. Kirkpatrick
Notary Public
Residing at: Kaysville, Utah.

My Commission Expires

12-August 1981

ADDENDUM C

ADDENDUM C

Recorded at Request of MARGARET R. EVANS
Box Elder County Recorder
at 3:05P. M. Fee Paid $ 5.00 ~~Brigham City, Utah 84302~~ DEC 9 1980
by Margaret R Evans ~~Dep.~~ Book 339 Page 678 Ref. 7-1-10-11-3 Indexed
Mail tax notice to Heritage Park Partners Address 1194 Devon - Kaysville, Ut.

WARRANTY DEED BOOK 339 PAGE 678

HERITAGE PARK PARTNERS, of Kaysville, County of Davis, State of Utah, grantors, hereby CONVEY and WARRANT to HERITAGE PARK PLAZA, INC., a Utah Corporation

of Kaysville, County of Davis, State of Utah grantee for the sum of TEN AND NO/100---------- and other good and valuable consideration DOLLARS, the following described tract of land in Box Elder County, State of Utah:

- SEE SCHEDULE "A" ATTACHED HERETO -

No. 82457H
Date: DEC 9 1980
Time: 3:05PM Fee $ 5.00
Book 339 Page 678
Margaret R. Evans, Recorder
Box Elder County, Utah
By: Margaret R Evans Deputy

WITNESS, the hands of said grantors, this 24th day of October, A. D. 1980

Signed in the Presence of

HERITAGE PARK PARTNERS, by
James C Kaiserman
JAMES C. KAISERMAN, Partner
James E Oldham
JAMES OLDHAM, Partner
Ronald W. Stout
RONALD W. STOUT, Partner
Gerald E. Stout
GERALD E. STOUT, Partner
Gary V. Smith
GARY V. SMITH, Partner

STATE OF UTAH,
County of Salt Lake } ss.

On the 24th day of October, A. D. 1980 personally appeared before me James C. Kaiserman, James Oldham, Ronald W. Stout, Gerald W. Stout, and Gary V. Smith, Partners of Heritage Park Partnership, the signers of the within instrument, who duly acknowledged to me that they executed the same for and in behalf of said partnership.

Notary Public.

My commission expires 1-18-81 Residing in Salt Lake City, Utah

BLANK #101—WARRANTY DEED—© GEM PTG. CO. — 3213 SO. 2600 EAST — SALT LAKE CITY

PART OF THE NORTHWEST QUARTER OF SECTION 10, T11N, R3W, SLB & M:

BOOK 339 PAGE 679

BEGINNING AT A POINT ON THE SOUTH LINE OF THE HIGHWAY RIGHT-OF-WAY WHICH IS LOCATED S89°51'47"W 637.42 FEET ALONG THE SECTION LINE AND S0°35'46"W 50.00 FEET FROM THE NORTHEAST CORNER OF THE NORTHWEST QUARTER OF SECTION 10, T11N, R3W, SLB & M; POINT OF BEGINNING ALSO BEING LOCATED N89°51'47"E 3.00 FEET FROM THE NORTHEAST CORNER OF PLAT R, TREMONTON CITY SURVEY, THENCE S0°35'46"W 300.05 FEET, THENCE N89° 47'46"E 231.06 FEET, THENCE NORTH 299.75 FEET TO THE SOUTH HIGHWAY RIGHT-OF-WAY LINE (POINT ALSO BEING THE NORTHWEST CORNER OF THE HARRIS TRUCK AND EQUIPMENT, INC. PROPERTY), THENCE S89°51'47"W 227.94 FEET ALONG SAID SOUTH HIGHWAY RIGHT-OF-WAY LINE TO THE POINT OF BEGINNING.

CONTAINS 1.58 ACRES

ABST'D. IN BOOK 3 of OF Sec PAGE 10-11-3 ✓

Index ✓

SCHEDULE "A"

ADDENDUM D

Tax Notices to:
Villatek Inc, C/O Golden Spike Bk.
Tremonton, Utah 84337

SPECIAL WARRANTY DEED

[CORPORATE FORM] BOOK 339 PAGE 680

HERITAGE PARK PLAZA, INC., a Utah Corporation, a corporation organized and existing under the laws of the State of Utah, with its principal office at Kaysville, of County of Davis, State of Utah, grantor, hereby CONVEYS AND WARRANTS against all claiming by, through or under it to

VILLATEK INC., a Utah Corporation

grantee of Salt Lake City, County of Salt Lake, State of Utah for the sum of TEN AND NO/100----and other good and valuable consideration----DOLLARS, the following described tract of land in Box Elder County, State of Utah:

- SEE SCHEDULE "A" ATTACHED HERETO -

No. 82458H
Date: DEC 9 1980
Time: 3:10PM Fee $ 5.50
Book 339 Page 680
Margaret R. Evans, Recorder
Box Elder County, Utah
By: Margaret R. Evans Deputy

The officers who sign this deed hereby certify that this deed and the transfer represented thereby was duly authorized under a resolution duly adopted by the board of directors of the grantor at a lawful meeting duly held and attended by a quorum.

In witness whereof, the grantor has caused its corporate name and seal to be hereunto affixed by its duly authorized officers this 24th day of October, A.D. 1980

Attest: Donald W. Stout
Secretary.

HERITAGE PARK PLAZA, INC.
By JAMES C. KAISERMAN
President.

[CORPORATE SEAL]

STATE OF UTAH,
County of Salt Lake } ss.

On the 24th day of October, A.D. 1980 personally appeared before me James C. Kaiserman and who being by me duly sworn did say, each for himself, that he, the said James C. Kaiserman is the president, and that the said ~~he~~ is the secretary of HERITAGE PARK PLAZA, INC., and that the within and foregoing instrument was signed in behalf of said corporation by authority of a resolution of its board of directors and said JAMES C. KAISERMAN and each duly acknowledged to me that said corporation executed the same and that the seal affixed is the seal of said corporation.

Bradley [illegible]
Notary Public.

My commission expires 1-18-81 My residence is Salt Lake City, Utah

PART OF THE NORTHWEST QUARTER OF SECTION 10, T11N, R3W, SLB & M:

BOOK 339 PAGE 681

BEGINNING AT A POINT ON THE SOUTH LINE OF THE HIGHWAY RIGHT-OF-WAY WHICH IS LOCATED S89°51'47"W 637.42 FEET ALONG THE SECTION LINE AND S0°35'46"W 50.00 FEET FROM THE NORTHEAST CORNER OF THE NORTHWEST QUARTER OF SECTION 10, T11N, R3W, SLB & M; POINT OF BEGINNING ALSO BEING LOCATED N89°51'47"E 3.00 FEET FROM THE NORTHEAST CORNER OF PLAT R, TREMONTON CITY SURVEY, THENCE S0°35'46"W 300.05 FEET, THENCE N89° 47'46"E 231.06 FEET, THENCE NORTH 299.75 FEET TO THE SOUTH HIGHWAY RIGHT-OF-WAY LINE (POINT ALSO BEING THE NORTHWEST CORNER OF THE HARRIS TRUCK AND EQUIPMENT, INC. PROPERTY), THENCE S89°51'47"W 227.94 FEET ALONG SAID SOUTH HIGHWAY RIGHT-OF-WAY LINE TO THE POINT OF BEGINNING.

CONTAINS 1.58 ACRES

SUBJECT TO A RIGHT-OF-WAY OVER THE EAST 66 FEET OF SAID PROPERTY, FOR THE PURPOSE OF A PROPOSED ROAD.

THE GRANTORS HEREIN RESERVE A RIGHT OF WAY FOR THE PURPOSE OF INSTALLING AND MAINTAINING A BILLBOARD, OVER A PORTION OF SAID PROPERTY, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

BEGINNING AT A POINT 66 FEET WEST OF THE NORTHEAST CORNER OF THE AFORE-DESCRIBED PARCEL, AND RUNNING THENCE WEST 5 FEET; THENCE SOUTH 15 FEET; THENCE EAST 5 FEET; THENCE NORTH 15 FEET TO THE POINT OF BEGINNING. TOGETHER WITH AN EASEMENT, AS NECESSARY FOR THE PURPOSE OF RUNNING A POWER LINE TO SAID BILLBOARD.

ABST'D. IN BOOK 3 OF Incs. PAGE 10-11-3 ✓

Indexed ✓

SCHEDULE "A"

ADDENDUM E

ADDENDUM E

IN THE FIRST DISTRICT COURT, COUNTY OF BOX ELDER

STATE OF UTAH

DEAN R. POTTER and DIANE S. POTTER dba DEAN'S SUPER LUBE, Plaintiffs, vs. RETA CHADAZ (Party who claims 66 foot Right-of-Way); GARY BYWATER and KARLEEN C. BYWATER (On Warranty Deed); FIRST AMERICAN TITLE INS. CO., (On Title Policy); and JOHN DOES 1-10, who may claim interest in said Right-of Way. Defendants.	**MEMORANDUM DECISION** Case No. 960000272QT Judge Gordon J. Low

THIS MATTER IS BEFORE THE COURT upon Cross Motions for Summary Judgment, the first having been filed by Plaintiffs Potter and the second by Defendant Chadaz. Thought the Motions demonstrate that there are some remaining issues of fact, the Court finds those issues are not sufficient to barr the granting of the Motion for Summary Judgment. On June 17, 1997, this matter was argued and the issues were identified. Thereafter, the Court received supplemental argument by both parties.

Without reciting all the issues and the basis for decision, the Court acknowledges that perhaps holding the Wade case (In the

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Matter of the Estate of: Thompson v. Wade, 509 N.E. 2nd 309 (New York 1987) is not entirely justified, but neither is the Defendant's reliance helpful. "Stranger to the deed" principles are not particularly beneficial to either party.

For the other reasons stated in the Plaintiff's Motion for Summary Judgment, the same is granted. The Motion for Summary Judgment filed by Defendant is denied. Counsel for the Plaintiff is directed to prepare a formal Order in conformance herewith.

DATED this 19 day of September, 1997.

BY THE COURT:

JUDGE GORDON J. LOW
FIRST DISTRICT COURT

STATE OF UTAH
FIRST DISTRICT COURT
BOX ELDER COUNTY

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, Dean R. And Diane B. Potter v. Reta Chadaz et al, Case No. 960000272, postage prepaid, this 19 day of September, 1997, to the following:

MARLIN J. GRANT, ESQ.
88 West Center
P.O. Box 525
Logan, Utah 84323-0525

REED W. HADFIELD, ESQ.
98 North Main
P.O. Box 876
Brigham City, UT 84302

JEFF R. THORNE, ESQ.
98 North Main
P.O. Box 876
Brigham City, Utah 84302

E Gill
Deputy Court Clerk

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ADDENDUM F

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IN THE FIRST DISTRICT COURT, COUNTY OF BOX ELDER

STATE OF UTAH

DEAN R. POTTER and DIANE S. POTTER dba DEAN'S SUPER LUBE, Plaintiffs, vs. RETA CHADAZ (Party who claims 66 foot Right-of-Way); GARY BYWATER and KARLEEN C. BYWATER (On Warranty Deed); FIRST AMERICAN TITLE INS. CO., (On Title Policy); and JOHN DOES 1-10, who may claim interest in said Right-of Way. Defendants.	**MEMORANDUM DECISION** Case No. 960Ø00272QT Judge Gordon J. Low

THIS MATTER IS BEFORE THE COURT upon a Motion brought by Defendant Chadaz for the Court to amend its Memorandum Decision and more specifically designate which grounds on the Rule 56 Motion which constituted the basis for the Decision.

In its formal Order as prepared by Plaintiff's counsel, the Court stated that the Summary Judgment was based upon the arguments, facts, and laws represented in Plaintiff's Memorandum and supplemental responses. By way of specificity, Defendant Chadaz conveyed away all rights of the 1.5 acres. No reservation was made therein and none was preserved on the record for

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Defendant's benefit. Defendant Chadaz does not have privity of contract and subsequent negotiations do not create a valid interest in favor of Chadaz. Chadaz did not receive any rights in the deed from Heritage Park Plaza Inc. to Villatek and Heritage Park Plaza Inc. could not reserve to Chadaz something it did not own. It was Chadaz's failure to reserve the right-of-way in the conveyance of the property to Heritage Park partners that would extinguish any right to then, or later, claim any easement.

Plaintiffs' purchase of the property occurred prior to the alleged Quit Claim Deed from Heritage Park Plaza Inc. to Defendant Chadaz.

The easement, if one ever existed, and if it consisted of any rights in Defendant Chadaz, was obviously, by all facts presented, unused for a period of approximately sixteen (16) years. No notice by any reliable factors before the Court demonstrate that Plaintiffs had notice of a transfer between Heritage Park Plaza Inc. and Reta Chadaz when Plaintiffs purchased the property. Any right that Heritage Park Plaza and/or Villatek may have had by way of easement, certainly could not be claimed to be in existence as demonstrated at the very least by the fact that Heritage Park Plaza was a defunct corporation as early as 1983.

Plaintiffs have claimed estoppel and there are, as reflected in their Memorandum and Affidavits, considerable reasons for the Court to give deference to that legal theory. Though there is some dispute relative to the claimed right-of-way, nothing appears of record and no evidence is presented that the right-of-way was used by Defendant Chadaz or others. Indeed, Defendant Chadaz has at

least one, if not several, access routes to her property which were used in lieu of any claimed right-of-way across Plaintiffs' property. No easement by necessity can be claimed here. Plaintiffs installed substantial improvements on the property, none of which were ever objected to by Defendant Chadaz. The facts also demonstrate that it is apparent that the claimed right-of-way has not, nor could be, reasonably used by Defendant Chadaz as the condition and terrain of the land, the ditch and the drop-off would demonstrate.

Plaintiffs have in fact been shown as bonafide purchasers without notice of the easement. Whether it existed ever or was extinguished by non-use, the easement had to have been terminated by the division of the property by Villatek, one of which went to Bywaters and eventually to the Plaintiff. No reservation of any deed was ever claimed by any of the parties and no number ever conveyed or reserved. The language relative to land deed or easement was for consideration for purchase of property, which purchase was never consummated, nor was the anticipated and envisioned subdivision ever started as was envisioned with respect to the claimed easement. There was a time certain for the completion of the claimed roadway which was October 1, 1981. It can certainly be concluded that failure to complete the roadway by that time vitiated any agreement, claim or right with respect to the same. Consideration entirely failed, conditions present failed, and it can only be concluded that the intended use was therefore frustrated and if any easement existed, the same became

nullified at that point. The Defendant essentially clams a right as a third party beneficiary to a failed contract. That is not an enforceable right against a non-party. In such cases, the Defendant's relief is not for specific performance against a stranger to the agreement, but for damages, if any, as against one of the parties.

As stated in the Court's original Order in this case and as found in the original Memorandum Decision, the Motion for Summary Judgment brought by the Plaintiffs is granted and this Memorandum Decision will serve only as a supplement thereto. No further Order need be submitted nor entered.

DATED this 21 day of October, 1997.

BY THE COURT:

JUDGE GORDON J. LOW
FIRST DISTRICT COURT

MAILING CERTIFICATE

I hereby certify that I mailed a true and correct copy of the foregoing MEMORANDUM DECISION, Dean R. And Diane B. Potter v. Reta Chadaz et al, Case No. 960000272, postage prepaid, this 21 day of October, 1997, to the following:

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Deputy Court Clerk

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